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Statement No: WITN1369014

Exhibits: WITN1369015-63

Dated: March 2020

INFECTED BLOOD INQUIRY

EXHIBIT WITN1369021

Advice

Introduction

1. I have been asked to advise on the possibility of a legal challenge to the proposed English financial payment scheme for recipients of contaminated blood products, "the English scheme", details of which were published on 13 July 2016.[1] In particular I have been asked to advise on the possibility of:
    a. Challenging the English government's decision to implement a scheme that is considerably less generous than the scheme announced in Scotland on 18 March 2016 ("the Scottish scheme").[2]
    b. Challenging the consultation process for the English scheme.

Summary

2. With regard to challenging the English scheme in comparison to the Scottish scheme I am sorry to advise that it will not be possible to require the English government to provide equal payments to English recipients to those received by Scottish recipients. It would not be possible to run a discrimination claim, as discrimination is based on one body treating two groups with the same characteristics differently. In this case a discrimination claim could not be made on that basis because the relevant issue is that of two different bodies (the English government and Scottish government) treating recipients in Scotland and recipients in England differently. A parallel example is that university students in Scotland do not have to pay tuition fees, whilst those in England do. Under the proposed payment scheme, the Scottish government has taken on responsibility for administering ex gratia payments as part of its devolved powers in the area of healthcare. Therefore a discrimination claim would not be possible.

3. With regard to legitimate expectation, there might be an argument that there is a legitimate expectation that English recipients will be treated the same as Scottish recipients. However, again that argument will be difficult to run given the fact of devolution. There is no obligation upon the English government to provide parity with the Scottish government under the current terms of the devolution settlement. I am very sorry to have to advise that, despite the strong moral case for treating English and Scottish recipients of payment in the same way, there are insufficient grounds for a legal challenge to compel the English government to provide the same level of payment as the Scottish government.

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[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539993/Consultation_response_acc.pdf

[2] http://news.scotland.gov.uk/News/Extra-20-million-for-infected-blood-support-2418.aspx

4. It may however be possible to challenge the consultation process. However, any successful challenge would lead to a re-consultation, and an opportunity to make fuller representations regarding the disparity between the English and Scottish schemes, but would not require the English government to provide parity with Scotland. The English government would however be required to consider the issue more fully.

5. Further, in terms of future steps, there would be a good argument for requiring the English government to consult on the proposed discretionary payment scheme, as details of this have not yet been finalised, particularly with regard to arrangements for the bereaved.

Factual background

6. Prior to the 2016 there were five payment schemes that provided financial support to patients infected with hepatitis C and/or HIV, as a result of infected NHS blood or blood products. The HIV financial support schemes (Macfarlane Trust/MFET Limited and Eileen Trust) pre-dated devolution and were managed and funded solely by the UK Department of Health. The two Hepatitis C support schemes (Skipton Fund and Caxton Foundation) post-dated devolution and although they operated as UK schemes, the Scottish government fully funded all costs (currently £2.5m a year) for qualifying persons within Scotland.

7. Following the publication of the Penrose Report in March 2015, the Scottish government established an independent financial review group of the payment arrangements. The group reported in November 2015.[3] In March 2016 the Scottish government accepted the key financial recommendations of the review group as follows:

    a. Annual payments for those with HIV and advanced hepatitis C to be increased from £15,000 a year to £27,000 a year, to reflect average earnings.
    b. Those with both HIV and hepatitis C to have annual payments increased from £30,000 to £37,000 to reflect additional health needs.
    c. When a recipient dies, their spouse or civil partner to continue to receive 75 per cent of their annual payment.
    d. Those infected with chronic hepatitis C to receive a £50,000 lump sum payment (previously £20,000), meaning an additional £30,000 for those who have already received the lower payment
    e. A new Support and Assistance Grants scheme to be established in Scotland, to administer and provide more flexible grants to cover

[3] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539993/Consultation_response_acc.pdf

additional needs. Scottish Government funding for this scheme to be increased from £300,000 to £1 million per year.

8. The Department of Health launched a consultation into reform of the current schemes in England on 21 January 2016. The consultation closed on 15 April 2016. There were 1557 consultation responses. According to the government response to the consultation, published on 13 July 2016[4]:

> "2.1 The consultation document proposed to replace the existing five schemes with a single body. This was intended to reduce reported confusion around the five current schemes and the support provided by them, and to maximise funding available to support beneficiaries by minimising running costs. We were clear in the consultation that a new scheme administrator could continue to provide other support, including financial and non-financial advice, and that the change would be as simple as possible for beneficiaries."

9. According to the impact assessment published on 01 July 2016[5] the aims of the new policy were as follows:

> 9. "The reforms should:
>
> - Be acceptable to a majority of scheme recipients, assessed in terms of their responses to the public consultation
> - Be value for money for taxpayers, in terms of economy, efficiency and effectiveness over the SR period
> - Not financially disadvantage existing scheme recipients in terms of what they could reasonably have expected to receive under the current, unreformed scheme
> - Lie within the Department's tolerance of legal risk, as defined by Ministers
> - Be affordable within the budget set for the current Spending Review (SR) period"

10. The original proposals, as consulted on, included proposals for individual assessment, no link to the CPI for annual payments, no payment upon progression from hepatitis C stage 1 to stage 2, a choice for bereaved partners of a one-off £5,000 payment or three years of annual payments, and the abolition of the discretionary support scheme other than for travel and accommodation.[6]

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[4] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539993/Consultation_response_acc.pdf

[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539994/IA_for_infected_blood.pdf

[6] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/494004/Infected_blood_cons_doc.pdf

11. Upon consultation there were significant objections to the proposals. In response to the consultation the English government proposed the following changes:

Annual payments	Current amount per year	New annual amount in 2016/17 and 2017/18*	Annual payment from 2018/19*	Over course of this spending review period 2016/17 to 2020/21*
Hepatitis C, stage 1	£0	£3,500	£4,500	£20,500
Hepatitis C, stage 2	£14,749	£15,500	£18,500	£86,500
HIV	£14,749	£15,500	£18,500	£86,500
Co-infected with HIV and hepatitis C stage 1	£14,749	£18,500	£22,500	£104,500
Co-infected with HIV and hepatitis C stage 2	£29,498	£30,500	£36,500	£170,500

12. Annual payments will be linked to the CPI from 2017/18. In addition, those infected with hepatitis C who progressed from hepatitis C stage 1 to stage 2 will receive a one off payment of £50,000 in addition to annual payments. Those newly joining the scheme will get a lump sum of £20,000 upon entry. There will be a new scheme for discretionary payments and lump sum of £10,000 to all those who were the partner or spouse of a primary beneficiary when they passed away and where infection with HIV/Hepatitis C contributed to their death.

13. The English and Scottish schemes therefore currently differ in the following manner:

	Scotland	England
Hepatitis C stage 1		£3,500-4,500 a year
HIV infection	£27,000 a year	£15,500-18,500 a year
Advanced Hepatitis C Infection	£27,000 a year plus £50,000 one off payment for those infected with chronic hepatitis C.	£15,500-18,500 a year plus £50,000 one off payment on progress from stage 1 to stage 2
Hepatitis C and HIV	£37,000	£18,500-22,500 a year (Hepatitis stage 1) £30,500-36,500 a year (Hepatitis stage 2)
Bereaved partners and spouses	75% of annual payment of deceased partner or spouse	One off payment of £10,000 and discretionary support

Discretionary support	A new Support and Assistance Grants scheme will be established in Scotland, to administer and provide more flexible grants to cover additional needs. Scottish Government funding for this scheme will be increased from £300,000 to £1 million per year.	Details to be published

14. The main differences between the two schemes are therefore the support available to bereaved partners and the annual payments available to those with advanced Hepatitis C and those with HIV and Hepatitis C stage 1. It is worth noting that the scheme has been modified in response to the consultation.

Potential grounds of challenge

The Scottish Scheme

15. I understand that there have also been concerns regarding eligibility for the Scottish scheme, in particular the requirement that it should be shown that individuals were infected in Scotland. This criterion appears to be based on the arrangements used where the Scottish government would reimburse Westminster for payments made under previous payment schemes. According to the recommendations of the Financial Review Group that examined the Scottish proposals:

> **"Current Eligibility**
> The issue of which claims were currently reimbursed by the Scottish Government was a complex one. Eligibility was currently set out in primary legislation, section 28 of the Smoking, Health and Social Care (Scotland) Act 2005. The legislative power currently only applied to an HCV scheme.
> Under the legislation, the relevant infected person must have been infected by NHS treatment in Scotland and resident solely or mainly in Scotland at the point they originally claimed (or were resident immediately before) financial support from the relevant UK support scheme (original lump sum payment from MFET/MSPT 1 and MSPT 2 and/or the Skipton Fund).
> Where the relevant infected person had died, they should have been infected by NHS treatment in Scotland and their sole or main residence should have been in Scotland when they died.
> The dual criteria had not caused any problems in practice. Scotland was responsible for all further payments emanating from the original claim. The country responsible for the original stage 1 payment becomes responsible for all future payments from Skipton and/or Caxton.
> Although the UK Government currently managed and funded all of the HIV payment schemes, if the Scottish Government was to take over

responsibility for those payments in the future it would only be for those people infected by NHS treatment in Scotland.
For HCV claims for infection in England, Wales and Northern Ireland the Fund were not required to apply the additional residence criteria. Only country of infection was relevant."

16. Upon reading section 28 of the Smoking, Health and Social Care (Scotland) Act 2005 it is not apparent that there is a criterion requiring a person to have been infected in Scotland, indeed the legislation clearly states that a person may have been infected anywhere in the United Kingdom but should be resident in Scotland.

17. However, I do not understand that Tainted Blood wish to challenge the Scottish scheme, as that would delay its implementation and delay payments to those recipients who would benefit from it. If there were concerns regarding the criterion for eligibility for Scottish families resident in Scotland who would be excluded from the scheme on the basis that they were not infected there, there could be grounds for a challenge in that the place of infection criterion is not based, as the Scottish Government appears to understand, on primary legislation.[7]

Discrimination

18. I have been asked to advise as to whether it would be possible to challenge the scheme on the grounds of discrimination. Unfortunately a discrimination action against the English government is not possible. If the English government were administering a UK wide scheme and the payments to Scottish recipients were more generous, then it would be a case of discrimination on the grounds of residency/nationality, i.e. it would be a government body treating groups with the same characteristics differently purely on the basis of residency/nationality with no clear justification.

19. Payments to victims of infected blood products have been devolved to Wales, Scotland and Northern Ireland,[8] and the English government is making payments only to recipients in England there is no basis for a discrimination claim. Wales, Northern Ireland and Scotland are entitled to implement more/less generous schemes if they wish, and the English government is under no obligation to provide parity with those schemes on the basis of discrimination.

20. The only potential basis for a discrimination claim would depend upon the funding of the payment scheme. As I understand it, Scotland is given a block of funds such that it can spend as it chooses, allocated according to the

[7] http://www.legislation.gov.uk/asp/2005/13/section/28#section-28-1-a-iii
[8] http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-07-18/43230

Barnett formula. Scotland can therefore choose to spend the funds as it wishes and no funding is tied to a specific area. If it were the case however that the allocation of funds to Scotland were assessed according to need, and therefore Westminster was allocating more funds for the specific purposes/or as a specific result of the ex gratia scheme, then that would open up a discrimination claim. This is not (as I understand it) the case however.

Legitimate Expectation

21. I have been asked to advise as to whether it would be possible to argue that there was a legitimate expectation that victims of contaminated blood would be treated as a unanimous UK wide group in terms of ex-gratia payments. This expectation would be based on:
    a. The historic operation of the ex gratia schemes, both pre- and post-devolution.
    b. The common background of infection via blood batches distributed throughout the UK.
    c. The response of the English government to the Penrose Report – i.e. that despite being a Scottish report, it effectively deals with issues of contamination on a UK wide basis.

22. There are two problems with the legitimate expectation argument. Firstly, health functions have been devolved, and therefore while Scotland has not chosen before to exercise its powers in order to implement a different scheme for victims of contaminated blood products – it is perfectly entitled to do so at any point. Westminster would not have the power to stop Scotland from implementing its own scheme.[9] There are number of areas where Scotland has chosen to exercise its powers such as to produce considerable differences between England and Scotland, for example the payment of tuition fees, and the implementation of the bedroom tax, which applied in England but not in Scotland.[10]

23. The question is therefore whether English recipients of payments can establish a legitimate expectation that they would be treated with parity to their Scottish counterparts. On the basis of the statements that have been

[9] http://www.legislation.gov.uk/ukpga/1998/46/schedule/5. The 1998 Scotland Act does not set out devolved subjects but instead lists 'reserved matters' for which the UK Parliament retains responsibility. By definition, devolved matters on which the Parliament can legislate are all those which are not specifically reserved (with certain provisos set out in the Act). Health is not a reserved area.

[10] http://www.heraldscotland.com/news/13090853.Legal_challenge_over_fees_for_English_students_fails/;http://www.bbc.co.uk/news/uk-scotland-23279868; http://www.independent.co.uk/news/uk/politics/scottish-government-to-use-devolved-powers-to-remove-benefits-stigma-and-abolish-bedroom-tax-a6900576.html; http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10400&mode=pdf p. 49

made both in Parliament and in the Consultation it would be difficult to establish:

a. Even prior to the 2015/16 Scottish proposals, whilst it is true that the recipients of contaminated blood were treated as a UK wide group, it is unclear whether that was a conscious policy decision, or a result of the evolving patchwork nature of the ex gratia schemes.
b. Post the 2015/16 Scottish proposals there is no indication of a policy that Westminster would ensure parity with Scotland.
c. Even if there was such a policy that Westminster would keep parity with Scotland, the considerable financial differential between the Scottish and English schemes could be considered to be "good reason" to depart from that policy.

Effectiveness of the consultation

24. The duty of consultation is interpreted by the courts to require an opportunity to make written representations, or comment upon announced proposals. When such a duty does exist, the consultation must follow the following requirements (*Coughlan* [2001] QB 213 at [108]):

> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken"

25. There are two potential grounds of challenge to the consultation. Firstly, the consultation did not mention the new Scottish scheme at all, or ask for any views on it. There was mention within the Consultation of the fact that the proposals were for the purposes of distributing funds in England only, but it was not very clear. The Consultation Document referred to proposals to reform the payment scheme in England:

> "3.2 The proposals set out in this consultation are made on the basis that there is up to an additional £125m available over the next 5 years to assist eligible people who were infected in England."

26. The Consultation did not refer to the fact however that from now on, the English payment scheme would be entirely different from that in Scotland or indeed Wales and Northern Ireland. There was no opportunity to comment on this and instead the Consultation was couched in somewhat vague terms referring to general reform of the payment system. Indeed, it appears to have only been clarified in a written question in July that Wales and Northern Ireland would now have sole responsibility for administering the terms of the

payment schemes. Given the history of the infected blood scandal and the treatment of survivors as a group up to this point, this appears unfair.

27. Secondly, there is a duty to properly consider representations that are made and the government authority must have "embarked on the consultation process prepared to change course, if persuaded to do so", *(R v Barnet LBC E ex p B* [1994] ELR 357). There could be an argument that the Department of Health failed to give proper consideration to the representations made by Tainted Blood prior to the Consultation, as evidenced by its apparent misunderstanding of what those representations were, see paragraph 2.10 of the Consultation:

> "2.10 Those at the event agreed that the current schemes need to change. The financial support the group would like to see differs considerably from what is currently being provided. The attendees at the event identified a preferred monetary resolution, which would exceed what will be affordable within a new scheme."

28. As set out in Tainted Blood's report, this is a misrepresentation of the meeting and the Department of Health could be required to demonstrate that it took Tainted Blood's proposals seriously and also subjected them to proper financial analysis before ruling that they would be unaffordable.

29. However, Tainted Blood should note that, were the consultation itself to be challenged any remedy would be likely to be a re-consultation, rather than necessarily a change to the substantive scheme. It would however give an opportunity to make further representations regarding the disparity between the Scottish and English positions, although this argument may have less force, as the current proposals reduce some of the disparity in the original proposals consulted on.

Further steps

30. The response to the consultation refers to the fact that a new discretionary scheme will be in effect from 2017/18, but no details of the scheme have as yet been provided. The discretionary scheme is likely to have a major effect upon bereaved partners – one of the major issues of disparity between the Scottish and English schemes. Given its importance, arguably there is an obligation to consult upon any such proposals. Clarification of the Department's intentions could be sought now with a view to a potential challenge being brought to a negative response.

Conclusion

31. I would advise that a discrimination claim does not have any prospects of success, and that a legitimate expectation claim would be unlikely to succeed. It may be possible to challenge the consultation, however that

would lead to a re-consultation rather than necessarily any substantive changes to the scheme. If the Department were to confirm that they are not intending to consult on the proposals for the discretionary scheme, this may also be challengeable.

Anita Davies
19 August 2016